120-41

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1048.

THE COUNTY OF NEMAHA, PLAINTIFF IN ERROR,

vs.

AUGUSTUS FRANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 30, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas before the Honorable David J. Brewer, judge of the circuit court of the United States for the eighth circuit and district of Nebraska, and the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court at the term of May, A. D. 1886.

Be it remembered that on the 10th day of May, 1882, an amended petition was filed in said circuit court, the first count and prayer of which said amended petition is in words and figures following, to wit:

Petition.

In the United States Circuit Court in and for the State of Nebraska.

AUGUSTUS FRANK *vs.* THE COUNTY OF NEMAHA, NEBRASKA.

The plaintiff, Augustus Frank, respectfully represents to the court that he is a citizen of the United States, and a citizen of the State of New York, and a resident of said State; that the defendant, Brownville Precinct, is a subdivision of the county of Nemaha, and the said county of Nemaha is located in the State of Nebraska, and the said county commissioners are residents therein.

First Cause of Action.

Now comes the plaintiff and says that Brownville Precinct, in the county of Nemaha and State of Nebraska, is indebted to plaintiff in the sum of forty dollars, and further states that by virtue of an act of the Legislature of the State of Nebraska entitled "An act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvements in this State, and to legalize bonds
2 already issued for such purposes."

The board of county commissioners of the county of Nemaha did issue the special bonds or written obligations of said Brownville precinct the 20th day of August, A. D. 1870, to aid in the construction of the Brownville, Fort Kearney and Pacific railroad, and did upon said day deliver to said company the said bond, a copy of which is hereto annexed, marked Exhibit "A," and made a part of this petition; that said bond is one of a large sum of bonds issued by said board of commissioners, of the denomination of $500.00 each.

That prior to the issue of said bonds the proposition to issue the same was duly submitted to voters of said Brownville precinct, in strict accordance with the provisions of the said act of the Legislature, and that a large majority voted for said proposition; that all of said bonds called for interest at the rate of eight per cent. per annum, payable annually, and that said interest was by coupons; that for the years 1871 and 1872 the said Brownville precinct and the board of county commissioners duly paid said coupons when the same fell due, and did for said years levy a tax for the payment of the same, but for the years 1878 and 1879 they have entirely

failed and refused to levy a tax or pay the same, though often requested to do so, and that the following coupons are now due and payable, and that said interest was by coupons; that for the year 1878 the said defendant was indebted to the said plaintiff upon said coupons, which said coupon is in words and figures as follows, to wit:

"Interest $40.00. Coupon No. 8.

"On the 20th day of August, A. D. 1878, Brownville Precinct, in Nemaha county, State of Nebraska, promises to pay, at the treasurer's office in said county, to bearer forty dollars, being annual
3 interest on Brownville precinct railroad bond No. 53.

"J. L. McGEE,
"*Pres. Board of County Commissioners.*

"JAMES M. HACKER,
"*County Clerk.*"

That none of said sums has been paid, although the coupon was duly presented for payment to the treasurer of said county of Nemaha, and at the time it fell due, and at divers times afterwards, and payment refused.

That on or about the 20th day of February, A. D. 1871, for a valuable consideration the bonds and coupons were transferred in good faith to John Fitzgerald, and the said John Fitzgerald did transfer the same to the said plaintiff.

And that there is now due the said plaintiff from said defendant on said coupon the sum of forty dollars, with interest from the 20th day of August, 1878.

* * * * * * *

(Causes of action numbered from two to two hundred and twenty-six, inclusive, omitted by stipulation of parties.)

Wherefore the plaintiff, August Frank, prays judgment against defendant for the sum of four thousand and forty dollars, in addition to the amount prayed for in original petition, with interest on the sum of $920.00 from the 20th day of August, 1877, and with interest on the sum of $1,040 from the 20th day of August, 1878, and with interest on the sum of $560.00 from Aug. 20th, 1879, and with interest on the sum of $1,520.00 from August 20th, 1880, and for costs of this suit, and also $5,000.00, with interest from August 20th, 1878.

MARQUETTE, DEWEESE & HALL,
Att'ys for Pl'ff.

UNITED STATES OF AMERICA, *ss:*

T. M. Marquette, being duly sworn, says he is attorney of rec-
4 ord for the plaintiff in the case of August Frank *vs.* Nemaha County *et al.*, and that the plaintiff is a non-resident of the State of Nebraska, and the evidence of indebtedness on which this action is based *are* in the hands of affiant, and the facts set forth in the foregoing cause of action are true as he verily believes.

T. M. MARQUETT.

Sworn to before me and subscribed in my presence by T. M. Marquett, this 10th day of May, 1882.

F. E. McCRARY, *D. C.*

Upon the back of said amended petition appear endorsements in words and figures following, to wit: No. 98, F. Amended petition. Filed May 10, 1882. Elmer D. Frank, clerk.

Thereupon afterwards, to wit, on the 5th day of February, 1883, answer was filed in said case, which said answer is in words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the District of Nebraska.

AUGUST FRANK, Plaintiff,

vs.

NEMAHA COUNTY, in the State of Nebraska, Defendant.

Defendant, answering, avers that bonds and coupons thereto attached similar to those described in the petition were issued, but whether they are exactly like the description in the petition this defendant is unable to say. The total amount of the bonds so issued and sold, being one series under one proposition, amounted to one hundred thousand dollars. The said bonds and coupons were voted upon the following contract and conditions and none other: At the time of the vote for said bonds certain persons were attempting to organize a railroad corporation under the name of the Brownville, Fort Kearney and Pacific Railroad Company, the identical same organization named in said bonds, with a capital stock of two million dollars, but were unable to organize it, because unable to obtain a payment on said amount of stock of ten per cent. thereof, as required by law precedent to the right to do business; they considered and treated said series of one hundred thousand in bonds as one one-hundred-thousand-dollar cash subscription all paid up in cash in advance, and also they treated and considered bonds of the city of Brownville, situated within the said precinct of Brownville mentioned in the petition, of the nominal sum of sixty thousand dollars, as sixty thousand dollars cash subscription paid up in cash in advance, all as capital stock of said railroad company, aggregating one hundred and sixty thousand dollars, so considered and treated as cash capital stock paid in; but by considering the said bonds of the nominal sum of $160,000 as one hundred and sixty thousand dollars in money paid in on the capital stock there was still an insufficient amount paid in to enable the company to do business, there being no cash paid in, except on a few private subscriptions, and not exceeding ten thousand dollars, so that even by treating said bonds as money there was still a deficiency of thirty thousand dollars of the amount prescribed by law as a condition precedent to the organization of the company for the purpose of transacting any of the business for which it was sought to be organized. Defendant therefore denies that said railroad company

was ever a corporation with power to transact business or to receive municipal bonds for its aid.

Defendant therefore avers that neither said precinct nor said county had any power or authority to aid in the organization of said railroad company by subscribing *it* its stock or in any other manner. Defendant further avers that said pretended railroad
6 company never either filed or recorded its articles of incorporation, if any it ever had, in any county in the State of Nebraska, as by law it was compelled to do prior to its existence as a corporation.

In the transactions of issuing said bonds by defendant and of receiving the same by said pretended railroad company neither the defendant nor the said company had any power to act, and all the acts therein on both sides are and ever has been *ultra vires* and null and void.

The proposition submitted to the voters of said precinct as a basis of the right to issue said bonds was a proposition to subscribe by said precinct one hundred thousand dollars in stock and shares in the capital stock of said pretended railroad company, and pay the same in bonds aforesaid.

The total assessed valuation of all the property in the said precinct, as shown by the last assessment preceding the issuing of said bonds, was $920.00, and the issue of $100,000 in bonds was in excess of the amount allowed by law.

Defendant has no knowledge as to whether the plaintiff is a *bona fide* holder of said bonds or any part thereof, or whether he purchased them before due or paid any value therefor or purchased them at all, and, therefore, for the purpose of raising the issue and procuring the proof thereon by compulsory process, defendant denies the allegations of the petition on that subject, and also denies each and every allegation contained in the said petition, except such as it has herein expressly admitted in this answer.

At the time of the issuing of said bonds the said Brownville precinct comprised and included all the territory in said Nemaha county now known as Brownville precinct and Louden precinct, which territory comprises and includes the whole of Government township five north, of range fifteen east, and that part of township five north, of range sixteen east, lying and being between said
7 township five in range fifteen and the Missouri river, all in said county of Nemaha and State of Nebraska. Since the issue and delivery of said bonds the said Brownville precinct has been divided, and of part of the territory thereof a new precinct has been formed under the name of Louden precinct, which Louden precinct comprises and includes sections two, three, four, five, six, seven, eight, nine, ten, eleven, twenty, nineteen, eighteen, seventeen, sixteen, fifteen, fourteen, twenty-one, twenty-two, twenty-three, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, and thirty-three (2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 20, 19, 18, 17, 16, 15, 14, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, & 33), which is much the greater part of the territory of the said original Brownville precinct.

Defendant prays that it may go hence without day and recover its costs in this behalf expended.

J. S. STULL &
J. H. BROADY,
Att'ys for Def'ts.

STATE OF NEBRASKA, } ss:
Nemaha County, }

I, Sylvester Reed, being duly sworn, say I am one of the board of county commissioners of said county, and that the facts stated in the foregoing answer are true as I believe.

SYLVESTER REED.

Subscribed in my presence and sworn to before me this 3 day of February, 1882.

[SEAL.] M. P. MEADER,
J. P., Notary Public.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 98. Doc. F. August Frank *vs.* Nemaha County, Nebraska. Answer. The original being lost this copy is filed in place of it. Filed Feb. 5, 1883. Elmer D. Frank, clerk. J. H. Broady & J. S. Stull, att'ys for def'ts.

8 Thereupon, afterwards, to wit, on the 26th day of March, 1883, reply was filed in said case, which said reply is in words and figures following, to wit:

Reply.

In the Circuit Court of the United States for the District of Nebraska.

AUGUST FRANK *vs.* NEMAHA COUNTY, in the State of Nebraska.

Now comes the plaintiff in the above entitled cause, and for reply to defendant's answer denies each and every allegation therein contained, except so much thereof as in hereinafter expressly admitted.

Plaintiff for further answer admits that the said precinct subscribed for stock, and issued their bonds for the same in accordance with the proposition submitted to the people.

Plaintiff further says that said precinct, through the county commissioners acting for them, has ever since held said stock and used the same, and has voted the same at all meetings of the corporation on the Brownville, Fort Kearney and Pacific Railroad Company, and still holds the same.

Plaintiff submits, under advice of counsel, that, by holding the said stock and using it, that whatever informality, if any there was in its issuance, that the said Nemaha county and the said precinct of Brownville is estopped from setting up the same, and reaffirms what they state in their petition.

That by receiving and accepting and the holding of said stock and by using it, and not tendering it back, that the said Nemaha

county and the said precinct of Brownville are estopped from setting up the same, and plaintiff reaffirms what they have stated in their petition.

T. M. MARQUETT,
Att'y for Pl'ff.

9 UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

T. M. Marquett, on his oath, says that he is attorney-of-record in the above-entitled cause; that the facts stated in the foregoing reply are true, as he believes.

T. M. MARQUETT.

Subscribed in my presence and sworn to before me this 26th day of March, A. D. 1883.

ELMER D. FRANK, *Clerk.*

Upon the back of said reply appear endorsements in words and figures following, to wit: No. 98, F. In the circuit court of the United States. August Frank *vs.* Nemaha County. Reply. Filed Mar. 26, 1883. Elmer D. Frank, clerk. Marquett & Deweese, att'ys for pl'ff.

Thereupon, afterwards, to wit, on the 21st day of January, 1884, motion to strike out a portion of the answer was filed in said case, which said motion is in words and figures following, to wit:

In the Circuit Court of the United States.

AUGUST FRANK *vs.* THE COUNTY OF NEMAHA.

Now comes the plaintiff and moves the court to strike out all of said answer commencing at the word "the" at the commencement of line number eight on first page of said answer, counting from top of page and down to and including all of said answer except that portion of the same that says: "Defendant has no knowledge as to whether the plantiff is a *bona fide* holder of said bonds," or any part through and what follows in said answer. This motion is intended to cover all except general denial as immaterial and irrelevant.

T. M. MARQUETT,
Att'y for Pl'ff.

10 Upon the back of said motion appear endorsements in words and figures following, to wit: No. 98. Doc. F. August Frank *vs.* Nemaha County, Nebraska. Motion to strike out a portion of the answer. Filed Jan. 21, 1884. Elmer D. Frank, clerk. T. M. Marquett, att'y for pl'ff.

Thereupon, afterwards, at the January term of said court, on the 21st day of January, 1884, the following proceedings were had and done in said case, as appears of record on folio 161, journal "I" of said court, to wit:

Motion to Strike Out Portion of Answer Sustained.

AUGUSTUS FRANK *vs.* NEMAHA COUNTY.

This cause coming on to be heard on the motion of the plaintiff to strike out a portion of the answer of defendant was argued and submitted to the court by attorneys for the respective parties, and, being fully advised in the premises, it is now on this day ordered by the court that said motion be, and the same is hereby, sustained; to which ruling and order of the court said defendant, by its attorney, excepts.

Thereupon, afterwards, at the said January term of said court, on the 26th day of January, 1884, the following proceedings were had and done in said case, as appears of record on folios 189 & 190, journal "I" of said court, to wit:

Trial.

AUGUSTUS FRANK *vs.* NEMAHA COUNTY.

Now come the parties herein by their attorneys; also come the following-named persons as jurors, to wit:

1, T. J. Mason; 2, Alfred Bruner; 3, David F. Phillips; 4, James Connell; 5, L. W. Miller; 6, E. M. Stockten; 7, W. W. Carder; 8. M. Stine; 9, John Scribbins; 10, Sidney Smith; 11, J. C. Higby; 12, W. W. Kendall, who were duly empaneled and sworn according to law.

11 And thereupon, after hearing the evidence, argument of counsel, and charge of the court, the jury retire to their room in charge of a bailiff duly sworn for deliberation. And now come said jury into open court and present to the court their verdict, which is in words and figures following, to wit:

In U. S. Circuit Court.

AUGUSTUS FRANK *vs.* NEMAHA COUNTY.

We, the jury, being duly empanelled and sworn, do find for the plaintiff and assess the amount of his recovery at the sum of twelve thousand nine hundred eighty-nine and $\frac{97}{100}$ dollars.

SIDNEY SMITH,
Foreman.

Thereupon afterwards, at the May term of said court, on the 7th day of May, 1886, the following proceedings were had and done in said case, as appears of record on folio —, journal "L" of said court, to wit:

Motion for New Trial Overruled and Judgment.

AUGUSTUS FRANK
vs.
NEMAHA COUNTY. } No. 98, F.

This cause came on for hearing on the motion of the defendant herein to set aside the verdict and for a new trial herein, and the

court, on consideration thereof, does overrule the same. It is therefore ordered and adjudged by the court that the said plaintiff recover from the said defendant the sum of twelve thousand nine hundred eighty-nine & $\frac{97}{100}$ dollars ($12,989.97), as heretofore by the verdict of the jury found due, with interest thereon from the 26th of January, 1884, together with $——, costs herein ex-
12 pended; to which order and judgment of the court said defendant then and there duly excepted.

Thereupon afterwards, to wit, on the said 7th day of May, 1886, stipulation was filed in said case, which said stipulation is in words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States, District of Nebraska.

AUGUSTUS FRANK, Plaintiff,
vs.
NEMAHA COUNTY, Defendant. } No. 98, F.

It is hereby stipulated between the plaintiff and defendant that in the petition filed in this cause on which the judgment is rendered the two hundred and twenty-six causes of action are upon that number of coupons alike in amount and form that have been detached from bonds alike in form and amount, all of the same issue, and that said coupons only differ in number and date of maturity and are for the interest accrued on said series of bonds from August, 1878, to August, 1880. And it is hereby stipulated that in making up the record in this cause in said court and for the Supreme Court, to which it is proposed to carry the said cause, that only one cause of action on one of the said coupons shall be included in the record of the petition and in the record in said cause, and the clerk of said court shall insert in the record a statement certifying that there are in said petition so many causes of action which are so omitted, and that this stipulation as to the above facts shall stand for and in the place of all the other causes of action in said petition contained, and that no objection shall be made by either party in said courts by reason of this stipulation of facts taking the place of said several causes of action so omitted.

J. M. WOOLWORTH,
Att'y for Pl'ff & of Counsel.
13 WALTER J. LAMB,
Attorney for Defendant.

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 98. Doc. F. Augustus Frank *vs.* Nemaha County. Stipulation. Filed May 7, 1886. Elmer D. Frank, clerk.

Thereupon afterwards, to wit, on the 24th day of June, A. D. 1886, a writ of error was allowed in said case and a citation issued thereon,

of which said writ of error and citation the following are the originals:

14 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America, to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Augustus Frank, plaintiff, and the county of Nemaha, defendant, a manifest error hath happened, to the great damage of the said defendant in the said cause, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 24 day of June, 1886.

ELMER D. FRANK, *Clerk.*

Allowed by—

ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 98, F. United States circuit court, district of Nebraska. Augustus Frank *vs.* Nemaha County. Writ of error. Filed June 24, 1886. Elmer D. Frank, clerk.

15 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To Augustus Frank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein the County of Nemaha is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable *Salmon P. Chase,* Chief Justice of the

Supreme Court of the United States, at Omaha, this 24 day of June, 1886.

ELMER S. DUNDY, *Judge.*

16 [Endorsed:] No. 98, F. United States circuit court, district of Nebraska. The County of Nemaha, Nebraska, pl'ff in error, *vs.* Augustus Frank, def't in error. Citation. Filed June 24, 1886. Elm-r D. Frank, clerk. Due personal service of within citation admitted this 28th of June, 1886. J. M. Woolworth, att'y for Augustus Frank, def't in error.

17 UNITED STATES OF AMERICA, *District of Nebraska,* } *ss*:

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios from one to 16 contain true and faithful transcripts of the pleadings, to wit, the petition, answer, and reply, and the motion to strike out portions of the answer and the order of the court thereon, verdict of the jury and the final judgment thereon, and stipulation of parties, and the whole thereof, and the endorsements thereon, in the case of Augustus Frank *vs.* Nemaha County, Nebraska, and that a copy of the writ of error and citation has been lodged and remains in my said office; and I further certify that the said petition contains two hundred and twenty-six causes of action upon coupons alike in amount and form, two hundred and twenty-five of which are omitted from the record of the petition herein in accordance with the stipulation of the parties to said suit, inserted in the record herein in lieu thereof.

Witness my hand and the seal of said court, at Omaha, this 29th day of June, A. D. 1886.

[Seal United States Circuit Court.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: [Stamped:] Supreme Court U. S. Received Sep. 29, 1886. Clerk's office. Nebraska C. C. U. S. No. 1048. The County of Nemaha, plaintiff in error, *vs.* Augustus Frank. Filed September 30, 1886.

120-41

IN THE

SUPREME COURT

OF THE

UNITED STATES,

October Term, 1886.

NEMAHA COUNTY, Plaintiff in Error,

vs.

AUGUSTUS FRANK, Defendant.

Statement, Assignment of Errors and Brief of Plaintiff.

JOHN M. THURSTON,
J. S. STULL.
WALTER J. LAMB.
Attorneys for Plaintiff.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

October Term, 1886.

NEMAHA COUNTY, Plaintiff in Error,

vs.

AUGUSTUS FRANK, Defendant.

Statement, Assignment of Errors and Brief of Plaintiff.

JOHN M. THURSTON,
J. S. STULL.
WALTER J. LAMB.
Attorneys for Plaintiff.

STATEMENT.

This was an action brought upon coupons detached from bonds issued by the county commissioners of Nemaha county on behalf of Brownville precinct, to aid in the construction of the Brownville, Ft. Kearney and Pacific railroad.

The following is a copy of the bond:

STATE OF NEBRASKA } "COPY," } COUNTY OF NEMAHA.
No. 139. } } FIVE HUNDRED(500) DOLLARS

Brownville Precinct Railroad Bond.

Brownville precinct in the county of Nemaha, and the state of Nebraska promise to pay to or bearer at the office of the treasurer of said county of Nemaha the sum of five hundred dollars in ten annual installments, commencing ten years after the date hereof, to bear interest at the rate of 8 per cent per annum from date, payable annually upon presentation of the interest coupon issued therefor and hereto attached, and the entire principal of this bond is included in the last ten coupons and is payable upon the presentation of the same.

This bond shall be delivered up upon the payment of the last coupon hereto attached. This bond is issued to aid in the construction of the Brownville, Fort Kearney and Pacific railroad of Nebraska, in pursuance of an act of the legislature of the state of Nebraska, entiled an act to enable counties, cities and precincts to borrow money on their bonds or to issue bonds to aid in the construction or completion of works of internal improvements in the state and to legalize bonds already issued for such purposes.

Approved February 15, 1869.

In testimony whereof these presents are signed by the president of the board of county commissioners of Nemaha county, by order of said board in regular session, and countersigned by the county clerk and the coporate seal of said county hereto affixed at Brownville this 20th day of August A.D. 1870,

SEAL

L. I. McKEE,
President of board of
County Commissioners.

JAMES W. HACKER
County Clerk.

The bonds were issued in 1870 and are governed by the statute of 1869.

Section 1 of that act is as follows: That any county or city "in the state of Nebraska is hereby authorized to issue bonds to "aid in the construction of any railroad, or any other work of in- "ternal improvement, to an amount to be determined by the "county commissioners of such county or the city council of "such city, not exceeding ten per centum of the assessed valua- "tion of all taxable property in said county or city, provided the "county commissioners or city council shall first submit the "question of the issuing of such bonds to a vote of the legal "voters of said county or city, in the manner provided by chapter "nine of the revised statutes of the state of Nebraska, for sub- "mitting to the people of a county the question of borrowing "money."

And section 7 is as follows: "Any precinct in any organized "county of this state, shall have the privilege of voting to aid "works of internal improvement, and be entitled to all the privi "leges conferred upon counties and cities by provisions of this "act, and in such case the precinct election shall be governed in "the same manner as is provided in this act, so far as the same "is applicable, and the county commissioners shall issue special "bonds for such precinct, and the tax to pay the same shall be "levied upon the property within the bounds of said precinct. "Such precinct bonds shall be the same as other bonds, but shall "contain a statement showing the special nature of such bonds."

The total amount of the bonds issued in this series was one hundred thousand dollars, while the assessed valuation of the property in the precinct at that time was only nine hundred and twenty thousand dollars, so that the issue exceeded ten per cent of the last named sum.

The petition was in the usual form of declarations in such cases, the plaintiff alleging that the coupons came to them before their maturity for a valuable consideration without actual notice of any fact invalidating them.

The defendant answered setting up the following defenses, which the court on motion of the plaintiff struck out as immaterial and irrelevant, to this ruling the defendant excepted viz: (page 7 transcript.)

The said bonds and coupons were voted upon the following unlawful contract and condition and none other:

At the time of the vote of said bonds certain persons were attempting to organize a railroad corporation under the name of Brownville, Ft. Kearney and Pacific railroad company. The identical same organization named in said bonds with a capital stock of *Two Million Dollars* but were unable to organize it because unable to obtain a payment on said amount of stock of ten per cent thereof, as required by law precedent to the right to do business, they considered and treated said series of one hundred thousand dollars in bonds as one hundred thousand dollars cash subscription to the capital stock, all paid in advance, and also they treated and considered bonds of the city of Brownville, situated within said precinct of Brownville, of the nominal sum of sixty thousand as sixty thousand dollars capital stock subscription paid up in advance, all as capital stock of said railroad company aggregating one hundred and sixty thousand dollars, so considered and treated as cash capital stock all wholly paid in advance; but by considering the said bonds of the nominal amount of one hundred and sixty thousand dollars as money paid in on the capital stock, there was still an insufficient amount paid in to enable the company to do business, there being no cash paid in except on a few private subscriptions, and not exceeding ten thousand dollars; so that even by treating said municipal bonds as money there was still a deficiency of thirty thousand dollars of the amount prescribed by law as a precedent to the organization of the company for the purpose of transacting any of the business for which it was sought to be organized.

Defendant therefore denies that said railroad company was ever a corporation with power to transact business or to receive municipal bonds for its aid.

Defendants therefore aver that neither said precinct or said county had any authority to aid in the organization of said rail-

road company by issuing municipal bonds or by subscribing its stock or in any other manner.

Defendants aver further that said pretended railroad company never either filed or recorded its articles of incorporation, if any it ever had in any county in said state of Nebraska, as by law it was compelled to do prior to its existence as a corporation.

In the transaction of issuing said bonds by defendant and of receiving the same by said railroad company neither the defendant nor the said company had any power to act and all the acts therein on both sides are and ever have been *Ultra Vires* and null and void.

The proposition submitted to the voters of said precinct as a basis of the right to issue said bonds, was a proposition to subscribe by said precinct one hundred thousand dollars in stock and shares in the capital stock of said pretended railroad company and pay the same in said bonds as aforesaid and was utterly void and gave no right to issue the same.

The total assessed valuation of all the property in the said precinct as shown by the last assessment preceeding the issuing of said bonds was $920,000, and the issue of $100,000 in bonds was in excess of the amount allowed by law.

Thereupon the cause was tried to a jury resulting in a verdict and judgment for the plaintiff for $12,989 97 page 8 transcript.

ASSIGNMENT OF ERRORS.

The county now prosecutes this writ of error to reverse the judgment of the court below on the ground that the Circuit court erred in striking out of the defendant's answer and depriving it of the benefit of the above defenses pleaded in the cause.

1st The Circuit court erred in assuming and holding that the recitals in the bond in suit estopped the defendant or

were such as were sufficieut in cases invovling the rights of precincts to estop the defendant from pleading and availing itself of any manner of defense to these bonds.

The Circuit court erred in striking out what it did from the defendant's answer because the matter stricken out contains the following defenses which go to defeat and destroy the authority of the county commissioners to issue the bonds at all in behalf of a precinct, viz:

First. That the total amount of the bonds so issued, all being one series, under one proposition amounted to $100,000, while the total assessed valuation of all the property in the said precinct as shown by the last assessment preceding the issuing of said bond was $920,000, and that the issue of $100,000 in bonds was in excess of the amount allowed by law.

Second. That the bonds were issued without any legal proposition being submitted to or voted upon by the legal voters of said precinct, that the proposition which was submitted to the voters of said precinct as a basis of the right to issue said bonds was a proposition to subscribe by said precinct one hundred thousand dollars in stock and shares in the capital stock of a railroad to be organized, and to pay for the same in the said bonds.

Third. That the corporation, the railroad company, when said bonds were voted had in fact no legal existence. That the said bonds and coupons were voted upon the following contract and conditions and none other:

At the time of the vote of said bonds certain persons were attempting to organize a railroad corporation under the name of the Brownville, Fort Kearney and Pacific railroad company, the identical same organization named in said bonds with a capital stock of *two million dollars* but were unable to organize it because unable to obtain a payment on said amount of stock of ten per cent thereof as required by law, precedent to the right to do business; they considered and treated said series of one hundred thousand dollars cash subscription to the capital stock, all paid up in advance, and also they treated and considered bonds of the city of Brownville, situated within said precinct of Brownville, of

the nominal sum of sixty thousand as sixty thousand dollars capital stock subscription paid up in advance, all as capital stock of said railroad company aggregating one hundred and sixty thousand dollars so considered and treated as cash capital stock, all wholly paid in advance. But by considering the said bonds of the nominal amount of one hundred and sixty thousand dollars as one hundred and sixty thousand dollars in money paid in on the capital stock there was still an insufficient amount paid in to enable the company to do business, there being no cash paid in except on a few private subscriptions and not exceeding ten thousand dollars; so that even by treating said municipal bonds as money, there was still a deficiency of thirty thousand dollars of the amount prescribed by law as a condition precedent to the organization of the company for the purpose of transacting any of the business for which it was sought to be organized.

Defendant therefore denies that said railroad company was ever a corporation with power to transact business or to receive municipal bonds for its aid.

Defendants therefore aver that neither said precinct nor said county had any authority to aid in the organization of said railroad company by issuing municipal bonds or by subscribing its stock or in any other manner.

ARGUMENT.

I

Whatever the laws or the decisions may be in other states or in this court on cases arising under the laws of the other states, in Nebraska precincts are not now nor have they ever been corporations or possessed of any corporate power, privileges or franchises whatever. From the organization of the state their officers have been restricted to justices, constables, assessors and judges of elections, merely local officers in districts or subdivision of the state for police and revenue purposes. The connection of the county commissioners with these subdivisions has also always been of the most limited and restricted character. The election of the officers in the precincts is under the law of the states. The

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canvass of the vote by the county clerk and freeholders and their certificates of election from the county clerk. Even these officers exercising their duties in their midst are not empowered to act for or represent the precinct in any matter.

Without desiring to controvert here and at this time the jurisdiction of the courts of the United States to render judgments against the commissioners in form in proceedings against precincts for the collection of this class of bonds we insist now that the character of precincts under the laws of Nebraska and the relation of the several officers to these subdivisions of the county is such that the county commissioners possess no implied power or authority whatever as respects them, and that there is no statute in force in that state giving them authority to bind the taxpayers by any recitals whatever in the bonds to be issued by them, nor have they any power over the matter except to issue aid bonds within the narrow limits defined in the letter of the statute.

Counties as well as cities and school districts in Nebarska are made corporations by statute and the commissioners are made executive officers of the counties charged with the administration of their affairs in all the various details arising therein, but not so with precincts and here I cannot better enforce my view as to the restricted and limited character of the power and authority of the several officers over the tax-payers in these governm ntal subdivisions than by printiug here as part of my argument the opinion of that able jurist the Hon. Geo. B. Lake, who adorned the bench of Nebraska from its admission as a state for so many years and whose opinion upon this matter is entitled, in my judgment, to the greatest consideration In The State vs. Dodge county, 10 Nebraska p 21; speaking for the whole court in a case involving a judgment on precinct bonds he says:

In the consideration of this case the first inquiry naturally suggested is as to the effect of the judgment on which the application for the writ of mandamus is based, unless this judgment be effective as such against Fremont precinct, and conclusive of

the rights of the tax-payers thereof respecting the bonds in question, we suppose there is no foundation for the proposed tax, and that the relief sought must be denied.

The judgment in question is nominally against the county commissioners of Dodge County, but contains a provision for its payment by means of a tax to be levied upon the taxable property of Fremont precinct which is one of the political subdivisions of said county. The basis of this judgment was the accrued interest on certain internal improvement bonds, issued, it is said, pursuant to a vote of the electors of said precinct. With due respect to the court rendering it we must say that, after a careful examination of the subject, and in view of what that political subdivision of a county, denominated a precinct, really is, we are unable to discover any ground on which this judgment can possibly stand. We presume that no one who is at all conversant with the legislation of this state respecting them would for a moment contend that precincts can either plead or be impleaded in actions, or that they are capable of imposing upon themselves any obligation or liability whatever, except in pursuance of express legislative authority.

A glance at our statutes on the subject will show that with us precincts are just what and and no more than the word, as understood, imports-viz: Territorial divisions or districts created for certain political and administrative purposes, but without even the semblance of corporate character. Probably the first provision concerning them is found in the "act to provide for the organizations of new counties," etc., the third section of which declares that the county commissioners "shall proceed to divide such county into suitable precincts," and fix the time for "holding the first election of precinct and county officers," (Gen. stat. 226) but the only precinct officers to be elected—and indeed the only ones known to our laws—are justices of the peace, constables, assessors, and judges and clerks of election, whose powers and duties respectively are only those usually conferred upon such officers.

Neither of them is empowered to act for or represent the precinct in any matter whatever. From this brief statement, which,

with the single exception hereafter to be mentioned, covers all we have to distinguish them as separate political entities, it will be seen that precincts are nothing more than mere territorial divisions of the people, made solely for convenience and efficiency in matters of state government. And it will be seen further, that as such, a precinct has not been given the power to enter into contracts either directly or indirectly, nor to assume obligation which a court might be called upon to enforce. The failure of the legislature to bestow upon precincts the capacity of suing and being sued is doubtless due to the fact of their entire inability either to assume obligations or acquire rights distinct from those of the whole body of the people of the county, of which they are a part.

The exceptional matter above alluded to is the authority given to precincts to aid in the construction of works of internal improvement. The manner in which this may be done is by the issue of interest bearing bonds, first authorized by a vote of the qualified voters of the proper precinct, to be paid by means of a special tax levied and collected on the taxable property therein as provided in chapter 35 General statutes, 448. When such bonds are issued conformable to the requirements of this chapter the mode of their payment is simple and plainly pointed out. To that end no judgment at law on the bonds or the interest coupons as they fall due, is contemplated, or at all necessary, for it is made the duty of the county commissioners of the proper county the one in which the precinct voting the bonds is—to levy and cause to be "collected and paid to the holders of such bonds a special tax on all the taxable property" within the precinct sufficient to pay the interest when it becomes due, and finally the bonds themselves at their maturity. In case of a failure or refusal of the commissioners to perform this duty it is provided that they may be compelled by mandamus to do so; and this is the appropriate and, we think, only remedy.

A judgment is said to be "the final determination of the rights of parties in an action." But it may well be asked whose rights were finally determined by the judgment rendered upon these coupons? The action was against the board of county commissioners, but they had no rights to be determined, nor

were they in the least interested herein. The only parties at all interested in any question that could possibly arise upon these coupons were the holders thereof on the one hand and the tax-payers of Fremont precinct on the other, of whom the court had jurisdiction only of the former.

The tax-payers were not before the court. They were not heard, and consequently their rights are still undetermined. If they had a valid defense to these bonds they have it still, notwithstanding this judgment, which as to persons of whom the court had no jurisdiction, is merely a nullity.

If we turn our attention from the precincts to the office of county commissioner under the laws of Nebraska, we must observe here also the exceedingly restricted power and authority given to these officials by statute over even those matters properly pertaining to the corporate affairs of the county. We think we may safely assert that in none of the other states have the courts by construction abridged their powers within narrower limits than in that state since the admission of the state. Beginning with

Stewart vs. Otoe County, 2 Nebraska, 183.

The courts of that state have strictly limited the power of these officers to the few administrative functions clearly expressed in the language of the statutes. Of the limited powers of these agents as thus defined all persons are bound to take notice If in the light of the above considerations we look to the letter of attorney of these special agents, the statute, we insist that no authority can be found there for the commissioners to make any recitals whatever that can bind the tax-payers of the precinct.

The legislature enacts the law under which the tax-payers elect their assessor, who takes the oath and returns the assessment roll into the county clerk's office; the county clerk files it and preserves it there as a permanent record, a notice to all the world of the amount of the assessable property in the precinct.

This assessment when returned there is made public notice to all persons; any person irregularly, improperly or excessively asseseed must take notice of it from this record and return. This assessment roll is carried into and extended at length in the tax list of the county, each precinct separately, where it remains as an important and permanent record of the county. The county treasurer's duplicate is made from it, and the county treasurer's charge and settlement is based yearly upon this record. The county commissioners have no concern with it and no control over it; it in no way appertains to their jurisdiction; it speaks for itself, the public financial ledger of the county, in the state, county and municipal system; the record of the debit and credit of the county with the state, with the municipalities with the citizens and between its officers. The plaintiffs were not less bound to take notice of this record than the commissioners, if it may be disregarded by one it may be by all, if it is not notice to all it is not notice to any one, it does not lie with the court to create by legal fiction any special class of persons who are exempted from such notice, it does not lie with the court to give by judicial construction powers to special public agents not given them by statute. The court below erred in holding, as it must have done, that the plaintiffs were not bound by this public record.

The court below must have proceeded upon the erroneous assumption that precincts had the power to vote bonds in aid of internal improvements without authorization by statute because the grant of power in the statute is only given to the amount of ten per cent of the assessment roll. Any propoisition submitted for a greater amount is a nullity as in every proceeding connected therewith, the infirmity is jurisdictional it is in the vote itself as as in every other step of the proceeding. No resident of the precinct was bound to attend, and vote against any such illegal scheme as this answer discloses was submitted to the voters of that precinct; they had the right to rely upon the protection and plain limitations of the law against the grossly illegal action of the county commissioners embarking any such paper railroad stock gambling transaction.

III

The grant of power to vote bonds in aid of works of internal improvement gave the precinct no authority to enter into a stock speculation and vote and issue bonds to buy stock with.

Jonesboro City vs. Cairo & St. Louis Railroad Company, 110 U.S. Rep. 192.

It is not impossible that many votes were obtained for the illegal proposition to exchange bonds for stock in this railroad company, that could not have been obtained for a donation of bonds to them; however that may be an authority to vote a donation of bonds is not an authority to vote bonds and exchange them for stock. In submitting the proposition in this case the commissioners had no warrant in the statute. As is said by the Supreme court of Nebraska in Hamlin vs. Meadville, 6 Nebraska 285. Where the commissioners by the statute had been given authority to *subscribe stock* and they made a donation of the bonds instead. "But if the authority to issue the bonds had "existed, the commissioners had no authority under the vote "of the people of the county to make a donation thereof "to the railroad company, there is no presumption that the stock "of a railroad company is of no value; but even if not very val-"uable the stock holder to the extent of his stock has a voice in "the election of officers of the company and in the control of its "affairs that may be of more value to his locality than the mere "market value of his stock."

We submit that the commissioners and voters had no power to depart from the strict letter of the law or to obtain or issue bonds by any attractive scheme whatever.

Scipio vs. Wright, 101 U. S. Rep. 665,
Marsh vs. Fulton county, 6 Wallace, 681.

The case of Marsh vs. Fulton county held that the bonds there could not be issued or were void because the company to whom they had been voted had become extinct under an attempted consolidation. In the present case as is shown by the answer strick-

en out, the bonds were voted and issued to a company before it had any existence, and for the illegal purpose of aiding in bring. ing it into existence, in a manner which was a violation of the law. They are therefore equally void in this case.

IV

This single issue of bonds in itself exceeded the statutory limit so that there was nothing for the commissioners to do or decide or determine or to cover by recitals in the bonds. "An "officer's certificate of a fact which he has no authority to deter- "mine is of no legal effect."

The very point in controversy was directly decided by this court in the case of Buchanan vs. Litchfield, 102 U. S. Rep. 289. in a case much more favorable for the bondholder than the present case is for the plaintiff, where the court held to use the language of the court in that case at page 229: "That the purchaser "of bonds was certainly bound to take notice not only of the "constitutional limitation upon municipal indebtedness but of "such facts as the authorized official assessment disclosed con- "cerning the valuation of the taxable property within the city for the year 1873." Here the plaintiff then had notice of two things, the statute and the assessment for that year. They showed the bonds to be void.

The first section of that act authorizes the issue of bonds of this character by any county or city in the state "not exceeding ten per cent of the assessed valuation of all taxable property in said county or city." Section 7 of said act confers upon precincts the privilege of voting to aid works of internal improvement and declares that they shall "be entitled to all the privileges conferred upon counties and cities by the provisions of this act." It cannot for a moment be claimed that this section confers any greater or more extensive powers upon a precinct than section one does upon a county or city. By the declaration that the precinct shall be "entitled to the same privileges" as the county or city there is also a declared limitation upon the power of the precinct of the same kind and to the same extent as the limitation which was at the same time upon the county or the city, and we have yet to hear

of any litigated case or any claim made that under the provision of section 7 a precinct was authorized to issue bonds in excess of ten per cent of the assessed valuation of such precinct. The only cases in which the question of the power of precincts to issue such bonds has arisen, so far as the amount to be issued is concerned, are the cases found in the 6th and 7th Nebraska.

State ex rel. A. & N. R. R. vs. Lancaster county. 6th Nebraska, 215.

Jones vs. Hurlburt, 13th Neb. 131.

In the second of these cases the only question which arose was, as whether or not in determining the extent to which the county could issue its bonds the bonded indebtedness of the precincts within the county were to be considered in making up the entire amount, and in this case the court held that under the law the ten per cent limit of the county was to be determined by reference to the amount of bonds issued by the county itself and was not to include any of the bonds which had been or were to be issued by precincts or other subdivisions.

In the other case it was claimed that as the county had already issued its ten per cent, the precinct was thereby deprived of any power to issue any bonds; and the court held that the county bonds were no bar to the right of the precinct to issue its bonds; but the question was not as to what per cent of bonds the precinct could issue.

And in neither of these cases was there issued by the precinct more than ten per cent of its own assessed valuation and the question did not in any way arise as to whether or not the precinct was limited in its issue of bonds to the same per cent as that in force concerning the county.

A case which to our mind is in point, is that of Harshman vs. Bates county, 92 U. S. Repts. 573. Where the principle that if the authority to issue bonds for a political subdivision of the county is not found in the law the bonds are void is applied to a case so strongly analogous to the present that we quote here a part of that opinion. The court say: "This is an action brought

V

It is not to be supposed that the law makers ever intended to authorize the unlimited issue of bonds by the mere territorial subdivision of the county while at the same time they were most careful to place the limitation upon the exercise of this dangerous power by the counties and cities, and so far as our experience and knowledge goes it has been always understood, by all persons and corporations seeking precinct aid in this state, that the power of the precinct was limited to the ten per cent, and a proposition has never been knowingly drawn or submitted by an attorney of recognized standing in Nebraska which authorized more than ten per cent donation by the precinct. Such being the statutory limitation it follows that an issue of bonds which in itself, by the very terms of the proposition authorizing its issue, was in excess of ten per cent of the entire assessed valuation of the precinct at the time the voting was had and the bonds issued, is illegal and absolutely void. The law now has been finally and conclusively settled by the Supreme court of the United States in the case of

Dixon county vs. Field, III United States Reports pg. 83.

and we deem it entirely sufficient to call the attention of the corut to the decision of the court in that one case; that decision is to the effect that the limitation of the act of the Legislature of Nebraska cited above is binding upon the municipal authorities and that an issue of bonds by a municipal corporation in excess of the ten per cent limitation is *absolutely* and *wholly void* and in that case, which was tried before his honor Judge Dundy, the plaintiff, Field, was found to be a *bona fide* holder of the bonds sued upon which constituted a part of the series of $87,000; which series had been issued in pursuance of a single proposition the sum total of which amounted to more than ten per cent of the assessed valuation of the county of Dixon issuing the bond

In that case it was claimed that the recitals on the bond estopped the county from insisting upon its defenee. The court in considering these recitals on page 92 says: "recurring then to the consideration of the recitals in the bonds, we assume, for the pur-

poses of this argument that they are in legal effect equivalent to a representation or warranty or certificate on the part of the county officers that everything necessary by law to be done has been done and that every fact necessary by law, to have existed, did exist, to make the bonds lawful and binding.,' The recitals in that case consisted of a declaration in the bonds themselves, of a certificate thereon of the county clerk, and of the further certificate of the state officers as provided by the constitution and the law. In determining the question as to the effect of these recitals, the court passed upon the question by first admitting that the recitals were as conclusive as they could have been made, and then passed on to determine whether or not recitals could be made upon bonds issued in excess of statutory limitations so as to make them good in the hands of the *bona fide* holders. The court then proceeded to decide that there are no officers authorized to sit as a determining tribunal and pass upon the question as to whether or not the issue is in excess of the limitation; they decided that, if the county officers issuing the bonds should recite upon the bonds that they did not exceed the statutory limitation, yet that they are without authority to so decide and the purchaser is bound to take knowledge of the law and must go to the records of the municipality for the purpose of ascertaining in some manner as to the facts in this respect. In the case before the court the only recital in the bond is as follows: "This bond is issued to aid in the construction of the Brownville, Fort Kearney and Pacific Railroad of Nebraska fn pursuance of an act of the Legislature" etc. There is no declaration in the bond itself as to the amount of the assessed valuation of the precinct and no declaration except as above stated which could in no wise amount to an assertion that the issue of the bonds was within the statutory limitations. In Dixon County vs. Field after deciding in the most positive terms that no recitals within or upon the bond could estop the county from setting up this particular defense, for the reason that the officers issuing the bonds could have no authority to bind the county by any recitals in that respect which they might choose to make: the court proceeds to refer to the fact that the amount of the entire issue in that case to-wit $86.000 was stated in the recitals upon the bond itself and from the fact sug.

gested that the holder of the bond was apprised of the whole amount of the issue; the only difference that can be urged between that case and the one at bar is the fact that the bond herein is simply numbered as one of a series and there is no recital or statement as to the amount of the entire issue. But in Field vs. Dixon county, as will be seen by a careful consideration of the opinion; the statement of the amount of the entire issue in the recital itself was not in any way one of the controling grounds upon which the decision of the court was based; it rests wholly and entirely upon the broad proposition that a series of bonds issued under a single proposition to an amouut in excess of the statutory limitations is wholly and absolutely void; that there is no power which could breathe the breath of life into them or give them any validity in the hands of any person; that therr is no board or tribunal which has the right or authority to put recitals into or upon them that would make them valid in the hands of a *bona fide* holder. In the case at bar the bond refers to an act of the Legislature under which it is issued and the purchaser is bound to ascertain and consider the provisions of that act under the provisions of that act he must know that a proposition has been submitted to the people to authorize an issue of the bonds and that this proposition which became a part of the record of the county contains the amount of the entire issue of bonds voted Each bond he buys is numbered as a part of a single series and he must ascertain at his peril what is the amount of the entire series and what is the amount of the assessed valuation of the precinct and if the issue is in excess of ten percent of the levy the bonds are void and the fact that he is a *bona fide* holder does not and cannot prevent the municipality from setting up and insisting upon this defense.

Since the decision of the Supreme court in Field vs. Dixon county it is useless to longer urge that the rule of law or equity should be strained to protect the *bona fide* holders of municipal bonds. The decisions of the court of last resort have already gone too far in this particular and the rights of the communities who have been induced under false pretenses to vote these bonds have too often by the courts been ignored. If in the case of Dixon

county vs. Field there was an underlying equity in favor of the people who had virtually been robbed of the bonds upon which the suit was brought, how much stronger in their favor is the case at bar, where a pretended corporation, which never had an existence, procured from the unsuspecting citizens of the precinct a large issue of bonds, upon the understanding that they were to be exchanged for stock in the corporation and that the railroad was to be built and operated for the benefit of the precinct, whereas, in fact, the corporation, so called, did not issue any of its stock in return for the bonds; pretended to comply with the terms of the proposition by laying a temporary railroad track, and having secured the bonds, themselves took up the track, vanished from the face of the earth, leaving the people without right or remedy unless they can be heard in a court of justice to defend against the payment of these iniquitous obligations.

WALTER J. LAMB,
JNO. M. THURSTON,
J. S. STULL.
Plaintiff's Attorneys.

V

It is not to be supposed that the law makers ever intended to authorize the unlimited issue of bonds by the mere territorial subdivision of the county while at the same time they were most careful to place the limitation upon the exercise of this dangerous power by the counties and cities, and so far as our experience and knowledge goes it has been always understood, by all persons and corporations seeking precinct aid in this state, that the power of the precinct was limited to the ten per cent. and a proposition has never been knowingly drawn or submitted by an attorney of recognized standing in Nebraska which authorized more than ten per cent donation by the precinct. Such being the statutory limitation it follows that an issue of bonds which in itself, by the very terms of the proposition authorizing its issue, was in excess of ten per cent of the entire assessed valuation of the precinct at the time the voting was had and the bonds issued, is illegal and absolutely void. The law now has been finally and conclusively settled by the Supreme court of the United States in the case of

Dixon county vs. Field, III United States Reports pg. 83.

and we deem it entirely sufficient to call the attention of the corut to the decision of the court in that one case; that decision is to the effect that the limitation of the act of the Legislature of Nebraska cited above is binding upon the municipal authorities and that an issue of bonds by a municipal corporation in excess of the ten per cent limitation is *absolutely* and *wholly void* and in that case, which was tried before his honor Judge Dundy, the plaintiff, Field, was found to be a *bona fide* holder of the bonds sued upon which constituted a part of the series of $87,000; which series had been issued in pursuance of a single proposition the sum total of which amounted to more than ten per cent of the assessed valuation of the county of Dixon issuing the bond

In that case it was claimed that the recitals on the bond estopped the county from insisting upon its defenee. The court in considering these recitals on page 92 says: "recurring then to the consideration of the recitals in the bonds, we assume, for the pur-

poses of this argument that they are in legal effect equivalent to a representation or warranty or certificate on the part of the county officers that everything necessary by law to be done has been done and that every fact necessary by law, to have existed, did exist, to make the bonds lawful and binding.,' The recitals in that case consisted of a declaration in the bonds themselves, of a certificate thereon of the county clerk, and of the further certificate of the state officers as provided by the constitution and the law. In determining the question as to the effect of these recitals, the court passed upon the question by first admitting that the recitals were as conclusive as they could have been made, and then passed on to determine whether or not recitals could be made upon bonds issued in excess of statutory limitations so as to make them good in the hands of the *bona fide* holders. The court then proceeded to decide that there are no officers authorized to sit as a determining tribunal and pass upon the question as to whether or not the issue is in excess of the limitation; they decided that, if the county officers issuing the bonds should recite upon the bonds that they did not exceed the statutory limitation, yet that they are without authority to so decide and the purchaser is bound to take knowledge of the law and must go to the records of the municipality for the purpose of ascertaining in some manner as to the facts in this respect. In the case before the court the only recital in the bond is as follows: "This bond is issued to aid in the construction of the Brownville, Fort Kearney and Pacific Railroad of Nebraska fn pursuance of an act of the Legislature" etc. There is no declaration in the bond itself as to the amount of the assessed valuation of the precinct and no declaration except as above stated which could in no wise amount to an assertion that the issue of the bonds was within the statutory limitations. In Dixon County vs. Field after deciding in the most positive terms that no recitals within or upon the bond could estop the county from setting up this particular defense, for the reason that the officers issuing the bonds could have no authority to bind the county by any recitals in that respect which they might choose to make: the court proceeds to refer to the fact that the amount of the entire issue in that case to-wit $86.000 was stated in the recitals upon the bond itself and from the fact sug.

gested that the holder of the bond was apprised of the whole amount of the issue; the only difference that can be urged between that case and the one at bar is the fact that the bond herein is simply numbered as one of a series and there is no recital or statement as to the amount of the entire issue. But in Field vs. Dixon county, as will be seen by a careful consideration of the opinion; the statement of the amount of the entire issue in the recital itself was not in any way one of the controling grounds upon which the decision of the court was based; it rests wholly and entirely upon the broad proposition that a series of bonds issued under a single proposition to an amount in excess of the statutory limitations is wholly and absolutely void; that there is no power which could breathe the breath of life into them or give them any validity in the hands of any person; that therr is no board or tribunal which has the right or authority to put recitals into or upon them that would make them valid in the hands of a *bona fide* holder. In the case at bar the bond refers to an act of the Legislature under which it is issued and the purchaser is bound to ascertain and consider the provisions of that act under the provisions of that act he must know that a proposition has been submitted to the people to authorize an issue of the bonds and that this proposition which became a part of the record of the county contains the amount of the entire issue of bonds voted Each bond he buys is numbered as a part of a single series and he must ascertain at his peril what is the amount of the entire series and what is the amount of the assessed valuation of the precinct and if the issue is in excess of ten percent of the levy the bonds are void and the fact that he is a *bona fide* holder does not and cannot prevent the municipality from setting up and insisting upon this defense.

Since the decision of the Supreme court in Field vs. Dixon county it is useless to longer urge that the rule of law or equity should be strained to protect the *bona fide* holders of municipal bonds. The decisions of the court of last resort have already gone too far in this particular and the rights of the communities who have been induced under false pretenses to vote these bonds have too often by the courts been ignored. If in the case of Dixon

county vs. Field there was an underlying equity in favor of the people who had virtually been robbed of the bonds upon which the suit was brought, how much stronger in their favor is the case at bar, where a pretended corporation, which never had an existence, procured from the unsuspecting citizens of the precinct a large issue of bonds, upon the understanding that they were to be exchanged for stock in the corporation and that the railroad was to be built and operated for the benefit of the precinct, whereas, in fact, the corporation, so called, did not issue any of its stock in return for the bonds; pretended to comply with the terms of the proposition by laying a temporary railroad track, and having secured the bonds, themselves took up the track, vanished from the face of the earth, leaving the people without right or remedy unless they can be heard in a court of justice to defend against the payment of these iniquitous obligations.

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Plaintiff's Attorneys.

120-41

IN THE

Supreme Court of the United States.

OCTOBER TERM, A.D. 1886.

NEMAHA COUNTY,

Plaintiff in Error,

vs.

AUGUSTUS FRANK,

Defendant.

REPLY BRIEF OF PLAINTIFF.

W. J. LAMB,
Attorney for Plaintiff in Error.

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REPLY.

In reply to the first point made in the defendant's brief, we suggest that this being a case at law, the practice and decisions under the code of civil procedure of Nebraska determine the point.

The following are the sections applicable:

SEC. 307. (Defined.) An exception is an objection taken to a decision of the court upon a matter of law.

SEC. 309. (Form.) No particular form of exception is required. The exception must be stated with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible.

SEC. 310. (How taken.—Record.) Where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted at the end of the decision that he excepts.

SEC. 572. (Motion—Defined.) A motion is an application for an order addressed to the court or a judge in vacation, by a party to a suit or proceeding, or one interested therein.

It is quite certain, looking at the motion and the answer upon what the court made its order striking out the defenses it did, by law it could proceed and make its order only upon the pleading and the motion itself.

"Truth is not considered on motion, and matter dehors the pleadings will not be looked to; therefore that the records of the court show that allegations of new matter in an answer of *res judicata* are not true, does not warrant striking them out." Scofield v. State Nat'l Bank, 9 Neb. 316.

If the matter constituted a defense, it was error to strike it out, and the exception was properly taken by the plaintiff in error. Dorsey v Hall, 7 Neb., 460.

WALTER J. LAMB,
Attorney for Plaintiff in Error.

120-41

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IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM 1886.

No. 1048.

THE COUNTY OF NEMAHA,

Plaintiff in Error,

vs.

AUGUSTUS FRANK.

BRIEF AND POINTS FOR DEFENDANT IN ERROR.

J. M. WOOLWORTH,

Attorney and of Counsel for Defendant in error.

IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM 1886.

No. 1048.

THE COUNTY OF NEMAHA,

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vs.

AUGUSTUS FRANK.

BRIEF AND POINTS FOR DEFENDANT IN ERROR.

We are content with the statement of the plaintiff in error in its brief.

FIRST POINT.

The questions raised by the counsel for the plaintiff in error cannot be considered by this court. The defendant alleged in its answer;

1. That the Brownville, Fort Kearney & Pacific Railroad Company, to aid which in building its road the bonds in question were issued, was not duly organized, because the amount of its capital paid

in was, under the statutes of Nebraska, insufficient to authorize it to transact business, and that it did not duly file its articles of incorporation:

2. The proposition submitted to the people for voting the bonds, contemplated a subscription to the stock of the railroad company, which was illegal.

3. The amount of the bonds voted and issued exceeded ten per cent of the assessed valuation of the taxable property of the precinct.

The plaintiff replied, denying the allegations of the answer, except that in which it is alleged that the bonds were issued to cover a subscription to the company's stock. Afterwards he moved the court to strike out of the answer all the matter above noted as immaterial and irrelevant, and thereupon the court sustained the motion by this order:

"This cause coming on to be heard on the motion of the plaintiff to strike out a portion of the answer of defendant was argued and submitted to the court by attorneys for the respective parties; and, being fully advised in the premises, it is now on this day ordered by the court that said motion be, and the same is hereby, sustained; to which ruling and order of the court said defendant, by its attorney, excepts."

This court is not informed upon what ground the motion was allowed, nor what testimony was offered or received on the trial of the cause. No exception to the order was saved by bill or otherwise than by the note

appended to it. This is insufficient to bring before this court the matter complained of.

Of the imperative necessity of a bill of exceptions in order to bring upon the record matter not otherwise a part thereof, nothing need be said here. This court has spoken too often and too emphatically to need to be reminded of its judgments on that point. The only question is, whether an order upon a motion can be reviewed here, unless a bill of exceptions is saved, setting forth the motion, the matter presented in its support and in opposition to it, the order upon it, and the exception duly taken and allowed. This particular question has been decided here.

In *Kearney vs. Denn*, 15 Wall. 51, the plaintiffs in error filed their motion in writing in the circuit court to dismiss the case, on the ground that the citizenship of certain of the parties defeated the jurisdiction. On page 56 Mr. Justice Swayne, speaking for the whole court, said:

"The court overruled the motion, but upon what ground does not appear. It is noted on the record that the plaintiffs in error 'reserved their exception to the decision of the court.' This is all that the record contains touching the motion. For aught that appears to the contrary, the court may have overruled it, because the facts of the residence of the defendants as stated in the motion were not proved, or because it was proved that they resided in a State or States other than Maryland. Error must be shown. It is never presumed. We cannot take cognizance of the exception reserved upon the record, any more

than we could of an exception noted in like manner to the admission of improper testimony or misdirection of the judge to the jury, in the trial of a cause. In order to bring the facts properly before us a bill of exception, setting forth what was proved and the decision of the court, should have been taken. As the record stands we cannot examine the subject. We have, therefore, not had occasion to consider the learned arguments submitted by the counsel of the respective parties upon the merits of the motion."

In *Knapp vs. The Railroad Company*, 20 Wall. 117, Mr. Justice Davis, delivering the opinion of this court, said: "If either party in an action at law is desirous of preserving the evidence, either at the trial or upon a preliminary motion, in order to raise a question of law upon it, he must ask to have it incorporated in a bill of exceptions. This is the only way in which it can be done, unless the parties choose to make an agreed statement of facts. Neither mode was adopted in this case; and we are therefore without the means of knowing what evidence was introduced on either side on the motion to remand. The question of jurisdiction is, therefore, to be decided upon the papers properly in the record."

In *Ray vs. Smith*, 17 Wall. 411, a motion was made before the trial to supress a deposition taken *de bene esse*. The court denied the motion, and an exception was taken; but it does not appear that it was preserved in the bill. The deposition was read on the trial, and the exceptant was deprived of the advantage of his exception.

The reason for requiring a bill of exceptions upon an order like this will readily appear from a consideration of the nature of motions. Formerly they were always *ore tenus*, and for that reason could not become a part of the record. This was the English practice and the State Courts followed that proceedure. When the theory of terms became modified, the practice obtained of giving notice of motions with the reasons to be assigned for them. But when the motion was made to the Court, no writing setting it forth was filed, any more than had been done under the earlier practice; the proceeding was merely oral. Under such a practice it is evident that the ruling of the court could not be reviewed except by making all the proceedings a part of the record, which could only be done by a bill of exceptions. The practice has sprung up in many parts of this country of filing a paper setting forth what action of the court is desired, and the grounds of it. But this practice has not changed the former rule, that such proceedings can only be brought into the record by bill of exceptions. Still, as heretofore, the record properly consists of the process, pleadings, verdict and judgment, unless more is by special order made a part of the record.

This rule obtains in the Federal courts, and must be considered as a part of their practice, unaffected by any new rules on the subject followed by the State courts.

SECOND POINT.

But if the court shall feel constrained, notwithstanding the state of this record, to examine the questions argued

by the counsel for the plaintiff in error, we think it clear that the court was right in the order complained of.

It must be observed, that there is no allegation in the answer that, at or before his purchase of the bonds and coupons, the plaintiff had any knowledge whatever of any of the matters pleaded, in order to avoid those instruments. All we have is a very indefinite denial that he is a bona fide purchaser for value before the coupons sued on became due, but nothing to show that he ever knew of any facts invalidating the bonds or coupons.

For the purposes of this case, therefore, and for the purpose of determining the correctness of the order upon the motion, the plaintiff below must be taken as a holder without notice of any facts invalidating the bonds, provided he was a holder of them for value before their maturity. And especially is there nothing to show what was alleged, proved or admitted on the hearing of the motion.

Having called attention to this fact, I proceed now to inquire whether the excess in the amount of the bonds above ten per cent. of the assessed valuation of the taxable property of the precinct, avoided them in his hands.

In the case of *Dixon County vs. Fields*, cited on the other side, this court held that bonds defective in this respect, were void in the hands of a bona fide holder for value without notice, because the inhibition upon their issue in the constitution was absolute, and did not submit to the determination of the county commissioners whether the amounts of bonds voted and issued was within the competency of the county. But here we have an entirely

different provision. These bonds were issued before the Constitution was adopted which contained the inhibition. They were issued in 1870. The Constitution was adopted in 1875. The limitation upon the power to issue more than ten per cent. of the assessed valuation of the county is only found in the statute of 1869, the first section of which will be found on the third page of the brief of the plaintiff in error. It runs as follows:

"Any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of ony railroad, or any other work of internal improvement, to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per centum of the assessed valuation of all the taxable property in said county or city, provided," the question of issuing them be submitted to the voters.

By the very terms of this statute the question of amount is submitted to the determination of the commissioners. This court has held in a long series of cases, that under such a statute an excess of an issue does not avoid the bonds in the hands of a bona fide purchaser for value without notice.

A case precisely like the one at bar is *Wilson vs. Salamanca*, 99 U. S. 499. The statute there provided as follows: "The board of county commissioners are hereby "empowered to issue the bonds of such county, city or "township, in any sum not greater than ten per cent., in- "clusive of all other bonded indebtedness, of the taxable "property of such county, city or township, for the pur- "pose of building bridges, etc."

The 1st Section of our act provides, "That any Coun-"ty is authorized to issue bonds, to aid in the construc-"tion of any railroad, to an amount to be determined by "the County Commissioners (etc.) not exceeding ten per "cent. of the assessed valuation of all taxable property in "said County or City." The Kansas Act says, "not greater than ten per cent.," the Nebraska Act says, "not exceeding ten per cent."

The case cited was certified to the Supreme Court upon a difference of opinion between the judges, and the first question was stated as follows: "Whether or not it "is a defense to this action by a bona fide holder of the "interest coupons sued on for value without notice, that "the amount of bonds, to wit, $75,000, issued by the de-"fendant, was in excess of the amount prescribed by the "acts of the Legislature of Kansas, approved February "25, 1870, and approved March 2, 1872, in relation to the "assessed taxable property of the defendant at the times "of voting and issuing said bonds."

Mr. Chief Justice Waite delivered the opinion of the Court. All that he says upon the question is as follows: "The first question certified is answered in the negative, "upon the authority of *Marcy vs. Township of Oswego*, "92 U. S. 637, decided in this Court since the trial be-low."

It would therefore appear that the question we are considering is settled in this court: but it is worth while to refer back to the case cited, and ascertain the line of argument by which the result was reached.

The provision in the statute on the point we are considering was as follows: "The amount of bonds voted "shall not be above such a sum as will require the levy of "more than one per cent. per annum on the taxable prop- "erty of the township to pay the yearly interest on the "amount of the bonds issued." Mr. Justice Strong delivered the opinion of the Court. He began by saying that the plaintiff on the trial proved that the bonds in question were issued and voted in strict compliance with the Act, unless they were in excess of the authorized amount; and he states the question to be, "Whether in this suit brought "by a bona fide holder for value, to recover the amount of "some of the coupons, it could be shown as a defense to "a recovery, that at the time of voting and issuing the "series of bonds the value of the taxable property of the "township was not in amount sufficient to authorized the "voting and issuing of the whole series amounting to "$100,000."

The learned judge sets forth the recital in the bonds, and says that each one of them declared that the commissioners of the County had caused it to be issued on behalf of the Township and duly executed; and then states that the question above recited cannot be considered an open one,—citing the Town of Coloma vs. Eaves, in the same volume. Proceeding further to explain the matter, he recites the terms of the first, second and fifth sections of the statute, and then says: "These provisions of the "Legislative Act make it evident not only that the county "board was constituted the agent to execute the power

"granted, but that it was comtemplated the board should "determine whether the facts existed, which under the "law warranted the issue of the bonds. The board was "to order the election if certain facts existed, and only "then. It was required to act if fifty free-holders, who "were voters of the township petitioned for the election; "if the petition set out the amount of stock proposed to be "subscribed; if that amount was not greater than the "amount to which the township was limited by the act; "if the petition designated the railroad company; if it "pointed out the mode and terms of payment. Of course, "the board and it only was to decide whether these things "precedent to the right to order an election were actual "facts. No other tribunal could make the determination, "and the members of the board had peculiar means of "knowledge beyond what any other persons could have. "Moreover these decisions were to be made before they "acted, not after the election and after the bonds had been "issued. The order for the election, then, involved a de- "termination by the appointed authority, that the petition "for it was sufficiently signed by fifty free-holders who "were voters; that the petition was such a one as was con- "templated by the law; and that the amount proposed by "it to be subscribed was not beyond the limit fixed by the "Legislature.

"So also the subsequent issue of the bonds, contain- "ing the recital above quoted, that they issued by virtue "of and in accordance with the legislative act, and in pur- "suance of and in accordance with the vote of three-fifths

"of the legal voters of the township, was another deter-
"mination, not only of the result of the popular vote, but
"that all the facts existed which the statute required in
"order to justify the issue of the bonds.

"It is to be observed that every prerequisite fact to
"the execution and issue of the bonds was of a nature
"which required examination and decision. The exis-
"tence of sufficient taxable property to warrant the amount
"of the subscription and issue was no more essential to
"the exercise of the authority conferred upon the board
"of county commissioners than was the petition for the
"election, or the fact that fifty free-holders had signed, or
"that three-fifths of the legal voters had voted for the
"subscription. These are all extrinsic facts bearing not
"so much upon the authority of the board issuing the
"bonds as upon the question as to whether that authority
"should be exercised. They are all by the statute refer-
"red to the inquiry and determination of the board, and
"they were all determined before the bonds and coupons
"came into the hands of the plaintiff. He was, therefore
"not bound when he purchased to look beyond the act of
"the Legislature and the recitals which the bonds con-
"tained."

Let the requirements of our statute be noticed so far as they are like those in the Kansas Act. With us, as with them, the commissioners were to submit the question of issuing the bonds to the legal electors. So that, in determining whether or not the question should be submited, they were compelled to find that the amount of

bonds was within the limitation. Then after the election they were to issue the bonds if the majority favored such action. Here again they were compelled to determine whether the amount of the bonds was within the limitation. Under the doctrine of the case cited, the board, and it only, was to decide this question. With peculiar means of knowledge, they were to decide upon the prerequisite facts.

But that is not all. Our statute contains a provision not found in the Kansas act. It says, in so many words, that the amount of the bonds to be issued is to be determined by the county commissioners If, therefore, the function of the officers to decide whether the issue was within the limitation may be deduced from circumstances, as was done in the case cited, how much more must that power be considered as entrusted to the commissioners under these explicit terms.

In all of the cases, down to Dixon County vs. Field, the doctrine above laid down was insisted upon in this court.

Surely the Supreme Court did not intend in its judgment in that case to overrule the long line of its decisions. This is the more certain because at the same term many municipal bond cases were decided upon the principles theretofore held by the court. One of them *Simons vs. Sherman County*, 109 U. S. 735, came up from Nebraska. It rose upon the very statute we are considering. The excess of the issue was held not to avoid the bonds in the

hands of a bona fide holder. It was decided in March, reaffirmed the settled doctrine of the court and *Dixon County vs. Field* was decided in the preceding January.

The presumption against the claim of the defendant here, arising out of these circumstances is rendered conclusive by the language of the court in the case for which a revolutionary purpose and effect is claimed. In fact some of the cases which we have cited above are referred to with approval, and a studious attempt is made by the learned judge to distinguish them from the case before him. The point upon which he rested the decision was, that there was no authority in the county board to determine whether the conditions precedent had been complied with. And he found that they had not been complied with, by reason of a provision in the constitution of 1875, not applicable to the case at bar, which was imperative in prohibiting the issue of bonds where the amount was excessive. Under that constitutional provision it was not within the competency of the Legislature to vest in any board an authority to decide the question, or by deciding it in favor of an excessive issue to conclude the county from alleging the truth. On the other hand when the sovereign people have spoken, inhibiting the Legislature from conferring the power, as well as subordinate officers from exercising it, then it is impossible under any conceivable circumstances for the power to exist.

The doctrine of that case was that, no power to decide the question was vested in the commissioners; under the statute that power was conferred in express terms.

That this case is not within the *Dixon County* case, is apparent from the argument of the learned judge. He cites the case of the *Town of Coloma vs. Eaves*, *supra*, and the language of Mr. Justice Strong, speaking for the court there, which we have above quoted at length, and agrees that where the act either from its terms, or its purport or spirit, vests in the board power to determine the preliminary matters, its decision is conclusive.

I have been at some considerable pains to compare the matters which in the case of the *Town of Coloma vs. Eaves* were held to be submitted to and determined by the county board with those which under our statute are committed to our boards; and I showed that the terms of the two several acts in these cases were almost exactly alike. Mr. Justice Mathews, in the *Dixon County* case accepts the doctrine laid down by Mr. Justice Strong in the *Town of Coloma* case; and as ours is precisely like the latter, we submit that the rule by which it is to be determined is to be found in the judgment of Mr. Justice Strong.

I therefore submit to the court with great confidence that the old rule is to govern this case, and that no new rule applicable to it has been laid down.

The case of *Buchanan vs. Litchfield*, 102 U. S. 189 is cited in opposition to these views, and an expression in the opinion of the court is cited, which, taken out of the connection in which it is used and the circumstances of the case, may possibly seem to support the contention of the plaintiff in error.

Let us see what that case was. The constitution of Illinois provided that "no county, city, township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose, to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness."

The court held that the recital in the bonds did not estop the city, because it was stated only that they were issued under the authority of a certain act of the Legislature, and in pursuance of an ordinance of the city, and were silent as to the constitution. And it was further held that there was no power to contract the indebtedness for which the bonds were issued, because nothing was left for the determination of the authorities of the city, as the terms of the constitutional provision were imperative, unlimited and unconditional.

As already shown, the bonds here in question were issued before the adoption of the Constitution of Nebraska of 1875, and the limitation is contained in the statute under which they were issued, and in pursuance of which it is expressly stated that they were issued. The opinion in the case cited follows the settled rule of this court and supports these bonds. The single detached expression in it, which is quoted, is used by the learned judge who delivered the opinion with reference to the constitutional

limitation, which we have not here, nor have we any statutory provision of like effect.

THIRD POINT.

Even if an issue of bonds by counties is void when their amount exceeds ten per cent. of the assessed valuation of the taxable property, that limitation does not restrict the competency to issue of precinct bonds. They are provided for in the seventh section of the act, which will be found on the third page of the brief of the plaintiff in error. Its terms are not controlled by the first section, and the privilege therein granted to precints is not limited to ten per cent. of the assessed valuation of the property in the precinct.

This question has been settled by the Supreme Court of Nebraska.

The State, ex rel A. & N. R. R. vs. Commissioners of Lancaster County, 6 Neb. 213 was an,original application for a mandamus to compel the defendant to issue $20,000 in the bonds of Capitol Precinct, under the authority of the act here under consideration. Mr. Justice Maxell, delivering the opinion of the court, after a very brief statement of the facts, says: "Two questions are "presented for our consideration: First, can a precinct "issue the bonds in excess of the limitation of ten per "cent, to which a county is restricted?" Stating then the second question, not material here to set ont, he answers the first, as follows: "Whatever the effect of the restric-

"tion upon a county, it is clear that it does not restrict the "subdivisions named from issuing their bonds in excess of "the limit fixed for the county."

This would seem to be decisive. It is a construction of an Act of the Legislature of the State by the Supreme Court thereof, and is therefore binding upon this Court.

It is said, however, on the other side, that this decision is inapplicable here, because in the case cited the excess complained of was formed by an addition of the county indebtedness to the amount of the precinct bonds; while in the case at bar the excess is in the precinct bonds alone, without counting any county indebtedness.

To this there are two short answers. First,—The facts set forth in the statement of the case cited do not bear out the claim. It no where appears that the court had its attention drawn to the county indebtedness, or that the same was in its mind when deciding the case, nor that the $20,000 of proposed bonds did not exceed ten per cent of the assessed valuation of the precinct. Second,—It makes no matter whether the excess appear by adding the county and precinct indebtedness, or by taking the precinct indebtedness by itself. The effect is the same in the one case as the other,—namely, the imposition upon a community, or an assumption by a community, of a burden greater than it can bear. The money to pay the debt is, of course, to be raised by taxation. What difference does it make to me, living in Capitol Precinct, whether half of my taxes shall go to pay the debt of the county, and the other half a debt chargeable upon myself and my

neighbors in the precinct or all of my taxes go to pay a charge on myself and my neighbors. The amount I pay is the same in one case as the other; the charge upon my property is the same in one case as the other. Why then is it permissible for me and my neighbors to charge ourselves with twenty per cent of the assessed valuation of our property in the form of county bonds and precinct bonds taken together and not of precinct bonds alone? If the court in the case cited intended simply to hold that precinct and county bonds together might exceed ten per cent of the assessed valuation, there is no ground for distinction between that case and the one at bar.

For these two reasons I submit that the case in the 6th Nebraska controls the question we are considering.

I respectfully refer the Court to *Jones vs. Hurlburt*, 13 Neb. 125, where the cese above referred to is affirmed.

If now we look at the language of Section 7, we are confirmed in this opinion. The language is: "Any pre-"cinct in any organized county in this state shall have the "privilege of voting to aid works of internal improve-"ment...."

If the section had stopped there, there would have been no possible ground for claiming that the privilege there conferred was limited or controlled by the language of Section 1. An unlimited power to issue the bonds would have been conferred. Nor was it possible for the Legislature, having conferred this unlimited power upon the voters of a precinct, to put a limitation, restriction or qualification upon the power granted, except by terms

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directly connected therewith and clearly expressing the purpose so to do. Any expression, term or phrase short of clear, distinct and decided language could not be construed to have such effect.

What have we further? The clause above quoted is followed by these words: "And be entitled to all the "privileges conferred upon counties and cities by provi- "sions of this act." These words are clearly used with a purpose of enlarging and not restricting the previous clause. Such is their natural and obvious meaning. Had it been the purpose of the Legislature to limit the power given by the first clause of the section, words like these would certainly have been used: "Subject to the limitations imposed by this act upon cities and counties."

But when, on the other hand, we find language used which implies a grant of power, it is not reasonable to say that it was the meaning of the Legislature to limit what was granted by the former clause. That is not according to the common usage of men in reading or writing. It is an artificial, strained and unreasonable construction, which limits the plenary power granted in the first clause by the second clause, which, according to the natural meaning of the terms used, enlarges, or would be taken by ordinary men as being intended to enlarge or define, the rights previously granted.

I admit that if all we had in this section were simply these terms, "Any precinct shall be entitled to all the "privileges conferred upon counties and cities by the

"provisions of this act," inasmuch as those municipalities could issue only bonds to a limited amount, precincts could not issue them for a greater amount. The privilege conferred by way of reference would be limited to the extent of the privileges so referred to, and not be entirely unlimited. But we are not to look to this clause only; we are to give full force and effect to the first as well as to the second.

It is said that there is the same reason for limiting the power of precincts as for limiting the power of counties and cities. If that were so, the construction contended for by the other side would not be permissible. The Legislature has spoken, and upon this question there is not room for construction; the language is too plain and simple to permit it. Read by an ordinary man, seeking in a simple and direct way to learn the meaning of the section, it has no uncertain sound; and the Court cannot go outside for reasons of policy and enlarge or restrict the expressed will of the Legislature.

But there is a very good reason for making a distinction between cities and counties, on the one side, and precincts on the other. Take the case of a county—the county of Douglas, for instance. It may be ofthe very first consequence to the prosperity of the precincts along the river to have a railroad built through them north and south, which will be of no earthly advantage to the precincts in the western part of the county. If by a vote of the people of the county the property owners in the west are to be charged with any portion of the cost of the railroad, it is fair and

right that a limitation of the amount should be made. It is not right that they should be at the mercy of the people owning property along the river, and be overwhelmed with debt to aid what can do them no good. On the other hand, it is safe to trust the people along the river to take care of their own interests and not assume obligations beyond their ability to meet. And there is no injustice in doing so if they are to meet the whole burden of what they think will be to their advantage. Precincts in this country are generally small; and what may help one part of them may ~~not~~ help another part. And so the injustice of making one man contribute to what will not help him but will help his neighbor, will not occur in voting precinct bonds.

And the same reason will appear for making a distinction between cities and precincts. To be sure the area of a city may not be greater than that of a precinct: it may not be so great as that of a precinct. But the population of a city and the wealth of a city is much greater than that of a precinct which is an outlying country subdivision of a county. A large part of the population of a city is made up of people who do not own much property; and at an election upon a proposition to vote bonds in aid of a railroad, property owners may be, and often are, outvoted by men who will have nothing to pay by way of taxes upon the debt incurred. In a country precinct the great proportion of the voters are property owners. Here is a good reason for making the distinction between cities and precincts.

Other reasons readily suggest themselves, but we will not take time to bring them forward, because all that can be asked of us is to show that the distinction made in the statute between counties and cities, on the one hand, and precincts on the other, was not unreasonable.

In order to induce the court to put a strained construction upon the language of the statute, on the ground that the Legislature would have been disposed to frame the provision to express the idea of the court, it is necessary to show that the reason for such construction is very urgent, and that the natural meaning of the language used is not at all reasonable. Judicial legislation will not be indulged in merely for the sake of expressing what the court might think wise and proper.

Such is not the case here. There was good reason for making the distinction which we have pointed out, and there is no propriety in the court reforming the statute according to its views.

FOURTH POINT.

The recitals in these bonds are conclusive upon the parties to this action although they are made by the county commissioners and debts are to be paid with money raised by taxing the precinct. After what this court has said in its several judgments upon like obligations made in Nebraska, it seems useless to discuss the question.

Davenport vs. County of Dodge, 105 U. S, 227, was upon precinct bonds of substantially the same form as those here in question. In the opinion delivered here the

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judgments of the supreme court of the state were carefully considered and extensively quoted from, in order to show the functions and relations of the board of county commissioners and the precincts. The Chief Justice says:

"When county bonds are issued under the statute in question, it is expressly provided that they shall constitute a debt against the county, to be paid by the levy and collection of taxes on all the taxable property within the county. If aid is voted by the precinct, bonds also are to be issued, differing only from county bonds in that they are to be paid from taxes levied on property within a precinct. 'As to the several duties of the county commissioners respecting them,' says the Supreme Court of Nebraska, in *State vs. Thorne*, (9 Neb. 458, 461), 'the law makes no distinction whatever between precinct and county bonds. They must issue both, and when issued it is their duty to keep a record of the kinds and amounts, as well as the times and places of payment, and make provision therefore, as the statute directs. In the case of precinct bonds the means of payment must be raised by a tax levied by the commissioners upon the property within the bounds of such precinct, which must be collected in the same manner as is the ordinary county revenue, and through the agency of the county treasurer, whose only duty in connection with the fund arising therefrom, when collected, is to hold it subject to the order of the county commissioners directing its application to the object, for which it was intended. As before stated, the management of this sort of precinct indebtedness is made to conform to that

of counties of like character. The sole distinction is that it concerns a distinct portion only instead of the whole body of the county. The money with which to meet the obligations of a precinct is raised and paid out with the same formality, and through precisely the same agencies, as are the ordinary county funds, and, except when there is some special provision of statute authorizing it, payment therefrom can be legally made only on warrants of the county commissioners according to law.'

"A bond implies an obligor bound to do what it is agreed shall be done. Precincts in Nebraska are but political subdivisions of a county. They have no corporate officers, and can neither sue or be sued. Certain officers are elected by the voters of precincts for political, administrative, and judicial purposes, but they are in no sense the representatives of the people of the territory as a municipality. *State vs. Dodge County*, 10 Neb. 20. Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the state. *Their relation to a county is like that of a ward to a city*. Having no corporate existance, no separate municipal authority, they cannot, says again the Supreme Court of the State, in the case last cited, 'enter into contracts directly or indirectly, nor assume obligations which a court might be called on to enforce.' Hence the precincts cannot become the obligor of precinct bonds, and we think it follows that the county, which does have a corporate existance, and can contract and be contracted with, and upon whose officers is imposed the duty

not only of issuing the bonds providing for the payment of them, is the political entity bound by the obligation and charged with the debt created thereby. The only difference between the two kinds of debt is, that in one all the taxable property of the county is charged with its payment and in the other only a part. In both the mandamus to enforce the levy and collection of the necessary taxes lies to the proper officers of the county alone. This remedy is expressly provided for, and thus the presumption which otherwise might arise of the intention to erect the precinct into a corporation for the purpose of these obligations, because, without it, the bonds could not be enforced, is rebutted. We think, therefore, that the special bonds which the county commissioners are to issue for the precincts are, in legal effect, the special bonds of the county, payable out of a special fund to be raised in a special way. Although the form of expression in the Nebraska statute is somewhat different from that in Missouri, which we were called on to consider in *County of Cass vs. Johnston*, (95 U. S. 360), we think the legal effect of it is the same. In Missouri it was provided that the bonds should be in the name of the county; but in Nebraska there can be no bond except it be of the county, and as a bond is to be made, it necessarily follows that the county must make it. In express terms it is stated that precinct bonds shall be the same as other bonds, that is to say, county bonds, but must contain a statement of their special nature, which confines the area of taxable property to a part rather than the whole of the county."

I do not see how the matter can be stated more perspicuously. The subject was again presented to the court in *Blair vs. Cuming County*, 111 U. S. 363, and the same views expressed.

It is a natural corollary to those cases that recitals in bonds of this character conclude the parties to them in the same way and to the same degree, as those in bonds payable by the whole county.

The other parts of the answer, striken out on motion, namely the defect in the organization of the railroad company, and the provision for the grant of bonds to pay for subscription to the stock, do not require remark. Whether they would constitute defenses to an action brought by the original holder of said bonds, this is certain: that they are immaterial facts in an action like this, brought by a bona fide holder for value without notice.

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